

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

ORDER

D-30

Motion to Compel Production of  
DoD General Counsel as Witness

1 October 2009

1. On 28 September 2009 the defense filed a motion requesting this Commission to compel the production of Department of Defense General Counsel Jeh Johnson as a witness to testify regarding the government's motion for a continuance in this case until 16 November 2009. The government opposes the motion.
2. The Commission, having granted the government continuance (P-003), DENIES this motion as moot.
3. This order and the pleadings related to it are authorized for public release pursuant to Rule 3.9 of the Rules of Court.

So Ordered this 1st day of October 2009.



W. Thomas Cumbie  
Colonel, U.S. Air Force  
Military Judge

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

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**Defense Motion**

to Compel Production of Hon. Jeh Johnson,  
General Counsel, Department of Defense,  
to Testify on P-003

28 September 2009

1. **Timeliness:** This Motion is timely filed. *See* RC 3.6.a.(1).
2. **Relief Sought:** Detailed defense counsel for Mr. Mohammed Kamin<sup>1</sup> respectfully requests the Commission enter an order that compels the government to produce the Hon. Jeh Johnson, General Counsel, Department of Defense (DoD), to personally appear and testify at a hearing<sup>2</sup> in Guantanamo Bay, Cuba wherein the parties will present evidence and argument concerning the Government Motion for an additional 60-day continuance (P-003).
3. **Burden and Standard of Proof:** As the moving party, the defense bears the burden to persuade that the testimony of Mr. Johnson is relevant and necessary on the matters pending before the Commission. The burden of proof on any factual issue the resolution of which is necessary to decide whether production is necessary shall be by a preponderance of the evidence. *See* R.M.C. 905(c)(1).
4. **Facts:**
  - a. The Hon. Jeh Johnson was nominated to serve as DoD General Counsel by President Obama on 20 January 2009 and confirmed by the Senate on 9 February 2009. As General Counsel, he serves as the chief legal officer for the DoD and legal advisor to the Secretary of Defense. *See* 10 U.S.C. § 140; *see also* Government Motion, P-003, Attachment A.

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<sup>1</sup> Detailed defense counsel file this Motion solely under the authority provided by the Commission on 21 May 2008 that detailed defense counsel shall represent the accused in this case and engage in the discovery process. The Commission ordered detailed defense counsel to represent Mr. Kamin because “the statute requires it” and because “discovery issues and all of the information that would be necessary for you to get your defense rolling.” *See Transcript (Draft), United States v. Kamin*, May 21, 2008, pg. 42. CPT West was detailed to the case on 29 January 2009.

<sup>2</sup> Pending before the Commission is a defense Special Request for Relief (D-029) that seeks a docketing order from the Commission scheduling this hearing for Wednesday, 7 October 2009.

b. In his official capacity as DoD General Counsel, Mr. Johnson is authorized to testify regarding the official policy of the Administration and the Department of Defense as it relates to Military Commissions and the Guantanamo Detention Facility. *See* “Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War,” 111<sup>th</sup> Cong. 11 (July 7, 2009) (**Attachment A**). Mr. Johnson has testified before the Senate Armed Services Committee and the House Armed Services Committee (24 July 2009) on issues relating to military commissions, Guantanamo, and detainee policy.

c. In his official capacity as DoD General Counsel, Mr. Johnson’s duties include to, “establish DoD policy on general legal issues, determine the DoD positions on specific legal problems, and resolve disagreements within the DoD on such matters.” *See* <http://www.dod.mil/dodgc/about.html> (last checked, 28 September 2009). In the Commissions context, Mr. Johnson has been called upon to resolve representation issues with general applicability to Judge Advocates serving in the respective services. For example, Mr. Johnson resolved a request from a Marine officer attorney and U.S. Air Force Judge Advocate, submitted to their respective Judge Advocate Generals, to represent a former Guantanamo detainee during his trial in the U.S. District Court because, “there needs to be a consistent DoD-wide approach to these requests.” *See* Memo to VADM MacDonald & BGen Walker, Subj: Request for Authorization to Represent Defendant in *United States v. Ahmed Khalfan Ghailani* (S.D. N.Y.) (LAK), dated 19 June 2009 (**Attachment B**).

d. On 16 September 2009 the Government filed a motion (P-003) for a continuance for a “period of only 60 days,” arguing that the “interests of justice” are best served by it being granted. The defense filed a response on 23 September 2009 requesting the Commission order the charges be withdrawn and dismissed with prejudice.

e. On 23 September 2009, the defense submitted a memorandum to the prosecution requesting Mr. Johnson be produced to testify before the Commission regarding P-003. **Attachment C**. On 25 September 2009, the prosecution denied the defense request. **Attachment D**.

## **5. Discussion:**

a. The right to call witnesses in one’s own defense has long been recognized as essential to a fair trial. *In re Oliver*, 33 U.S. 257, 273 (1948). In fact, “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973); *see also United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007). In a trial by military commission, this fundamental right is provided for in R.M.C. 703(a) and 10 U.S.C. § 949j (2006), and by Common Article 3, which requires that Mr. Kamin be afforded all the judicial guarantees that are “recognized as indispensable by civilized peoples.” Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 3318 (1955).

b. Mr. Kamin is entitled to the production of witnesses whose testimony is both “relevant and necessary.” R.M.C. 703(b)(1); 10 U.S.C. § 949j(a); *see e.g., United*

*States v. Breeding*, 44 M.J. 345 (C.A.A.F. 1996). The language contained in R.M.C. 703(b)(1) is identical to the language contained in Rule for Courts-Martial (R.C.M.) 703(b)(1), Manual for Courts-Martial, United States (2008 ed.). Relevant evidence is “necessary when it is not cumulative and when it would contribute to a party’s presentation of the case in some positive way on a matter in issue.” R.C.M. 703(f)(1) *Discussion*.

c. The issue before the Commission is whether to grant the government an additional 60-day continuance or to grant the defense request to order the charges withdrawn and dismissed with prejudice. In other words, the Military Judge must weigh the “interests of justice” argument of the government against the defense argument that the Commission should invoke its inherent supervisory powers to dismiss the charge because there is no viable theory under which this charge may be prosecuted in this forum and the government knows or reasonably should know this to be true.

d. As previously briefed, Mr. Johnson has testified twice before the Congress on behalf of the Executive Branch that the sole charge against Mr. Kamin is not a traditional offense in violation of the law of war. The defense acknowledges that it is indeed speculative whether material support will be stripped from the Military Commissions Act (MCA) if/when Congress amends it. However, what should *not* be speculative is what the DoD will do if it does not. Mr. Johnson can testify regarding the DoD *policy* as to whether military prosecutors will be permitted to prosecute an offense that it determined is not a traditional violation of the law of war in a forum that, by Supreme Court precedent, may only be used to try such offenses. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2780 (2006) (“At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.”).

e. This question is not a matter of law, *see* Government Response, ¶ 2 (Attachment D), rather it may only become a matter of law if material support is not stripped from the MCA, the government prosecutes this offense before a military commission, and the matter is raised before the Commission. Also, Mr. Johnson’s testimony on this matter is more than a mere “opinion” as to what will happen – Mr. Johnson has the authority to speak on behalf of the Administration and to resolve issues relating to Judge Advocates that require a “consistent DoD-wide approach.” Undoubtedly, this issue will be his to resolve.<sup>3</sup>

f. There is no need to wait on Congress before Mr. Johnson be called before the Commission to testify before this matter. Mr. Johnson is clearly on notice of this issue as he was “copied to” on the defense Memo to the Secretary of Defense, dated 5

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<sup>3</sup> The defense recognizes that Mr. Johnson is not authorized to make decisions regarding the referral of charges for trial by military commission as that authority is left solely to the Secretary of Defense and the Convening Authority. *See* R.M.C. 401. However, the decision to refer charges is separate from the decision to permit charges to be sworn in the first place, *see* R.M.C. 307, and to permit uniformed prosecutors to go forward on prosecuting this offense in violation of DoD policy. Regardless, this distinction is specious because Mr. Johnson is the primary legal adviser to both the Secretary of Defense and the Deputy Secretary of Defense, the Convening Authority’s reporting senior.

August 2009 and the defense second Memo to the Convening Authority, dated 11 September 2009, that briefed this issue. *See* Defense Response, P-003, Attachments C, E. Providing additional time for the DoD to ponder this issue would be in direct violation of both the spirit and the letter of the order of the U.S. Supreme Court that stated, “[w]hile some delay in fashioning new procedures is unavoidable, the cost of delay can no longer be borne by those who are held in custody.” *Boumediene v. Bush*, 128 S.Ct. 2229, 2275 (2008).

g. Finally, the prosecution attached an affidavit from Mr. Johnson to P-003 to support its position regarding the status of the review of Mr. Kamin’s case. *See* Government Motion, P-003, Attachment A. The defense asserted this affidavit contradicts the motion itself, namely whether Mr. Kamin is being considered for prosecution by an Article III court. The government later clarified that “two separate reviews are being conducted of detainee cases” and that “[a]lthough Mr. Kamin’s case was not recommended for prosecution in an Article III court, the Attorney General, in consultation with the Secretary of Defense, has not reached a final decision respecting the ultimate disposition of the accused’s case.” Government Response, ¶ 3 (Attachment D). This “clarification” illustrates further the need for Mr. Johnson to be produced to testify. He can provide actual clarification regarding the current status of the review of Mr. Kamin’s case by the “two separate reviews” because without this clarification, the Military Judge cannot rely upon the government’s assurance that a decision will be reached by 17 November 2009. At the very least, the Commission must recognize that the government put these facts at issue and the defense must be afforded the opportunity to explore these facts with Mr. Johnson because this would undoubtedly contribute to the defense “presentation of the case in some positive way on a matter in issue.” R.M.C. 703703(f)(1) *Discussion*

**6. Request for Oral Argument:** To ensure prompt resolution of this matter and the time to secure the witness’s personal appearance, if ordered, the defense waives oral argument.

**7. Additional Information:** “The Military Judge has the sole authority to determine whether or not any given matter shall be released.” *See* RC 3.9.c; *see also* R.M.C. 801; Reg. ¶¶ 19-5, 19-6. The Commission should seek to strike a balance of protecting Mr. Kamin’s right to a fair trial, the improper or unwarranted publicity pertaining to the case, and the public understanding of the Military Commissions. *See* Reg. ¶ 19-1. The release of pleadings and rulings is essential for the public, writ large, to be able to assess and evaluate the legitimacy of United States judicial proceedings being held on a military base overseas and in a fortified courtroom. At a minimum, providing the public the opportunity to read and evaluate the pleadings and rulings would contribute to Mr. Kamin being able to have a “public trial.” *See* U.S. Constitution, Sixth Amendment. This is especially true of the present motion as the sole basis for the continuance sought by the government is the “interests of justice.” The defense hereby respectfully requests that the Military Judge authorize the Assistant Secretary of Defense for Public Affairs (or designee) to release this pleading and any and all responses, replies, and/or rulings under the same designation to the public at the earliest possible date.

8. **Attachments:**

- A. “Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War,” 111<sup>th</sup> Cong. 11 (July 7, 2009) – 2 relevant pages
- B. Memo to VADM MacDonald & BGen Walker, Subj: Request for Authorization to Represent Defendant in *United States v. Ahmed Khalfan Ghailani* (S.D. N.Y.) (LAK), dated 19 June 2009
- C. Memorandum for the Prosecution, Subj: *United States v. Mohammed Kamin*: Defense Request for Production of Witness to Testify at hearing on P-003, dated 23 September 2009
- D. Memorandum for the Defense, Subj: *United States v. Mohammed Kamin*: Government Response to Defense Request for Production of Witness to Testify at Hearing on P-003

Respectfully submitted,

By: Richard E.N. Federico  
LCDR RICHARD E.N. FEDERICO, JAGC, USN

By: Clay M. West  
CPT CLAY M. WEST, JA, USAR  
*Detailed Defense Counsel for  
Mohammed Kamin*

Office of the Chief Defense Counsel  
Office of Military Commissions



# **Attachment A**

**HEARING TO RECEIVE TESTIMONY ON LEGAL  
ISSUES REGARDING MILITARY COMMIS-  
SIONS AND THE TRIAL OF DETAINEES FOR  
VIOLATIONS OF THE LAW OF WAR**

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**TUESDAY, JULY 7, 2009**

U.S. SENATE,  
COMMITTEE ON ARMED SERVICES,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:34 a.m. in room SD-106, Dirksen Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, Lieberman, Reed, Bill Nelson, Ben Nelson, Webb, Udall, Hagan, Begich, McCain, Inhofe, Sessions, Chambliss, Graham, Thune, Martinez, and Collins.

Committee staff members present: Richard D. DeBobes, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Gerard J. Leeling, counsel; Peter K. Levine, general counsel; and William G.P. Monahan, counsel.

Minority staff members present: Joseph W. Bowab, Republican staff director; Richard H. Fontaine, Jr., deputy minority staff director; Michael V. Kostiw, professional staff member; and David M. Morriss, minority counsel.

Staff assistants present: Mary C. Holloway, Paul J. Hubbard, and Christine G. Lang.

Committee members' assistants present: James Tuite, assistant to Senator Byrd; Christopher Griffin, assistant to Senator Lieberman; Carolyn A. Chuhta, assistant to Senator Reed; Neal Higgins, assistant to Senator Bill Nelson; Ann Premer, assistant to Senator Ben Nelson; Patrick Hayes, assistant to Senator Bayh; Gordon I. Peterson, assistant to Senator Webb; Roger Pena, assistant to Senator Hagan; Lindsay Young, assistant to Senator Begich; Gerald Thomas, assistant to Senator Burris; Anthony J. Lazarski, assistant to Senator Inhofe; Lenwood Landrum and Sandra Luff, assistants to Senator Sessions; Clyde A. Taylor IV, assistant to Senator Chambliss; Adam G. Brake, assistant to Senator Graham; Jason Van Beek, assistant to Senator Thune; Dan Fisk and Brian W. Walsh, assistants to Senator Martinez; and Chip Kenneth, assistant to Senator Collins.



policy decisions this administration faces. I look forward to hearing the views of our witnesses and working with you on these matters as the DOD bill moves forward toward floor consideration and conference with the House of Representatives.

Thank you, Mr. Chairman.

[The prepared statement of Senator McCain follows:]

[COMMITTEE INSERT]

Chairman LEVIN. Thank you so much, Senator McCain.

We'll first now hear from our inside panel, first the General Counsel for the Department of Defense, Jeh Johnson.

**STATEMENT OF HON. JEH C. JOHNSON, GENERAL COUNSEL,  
DEPARTMENT OF DEFENSE**

Mr. JOHNSON. Thank you very much, Mr. Chairman, Senator McCain, members of this committee. You have my prepared statement. I will dispense with the full reading of it and just make some abbreviated opening comments here.

Chairman LEVIN. All the statements will be made part of the record in full.

Mr. JOHNSON. Thank you.

I want to thank this committee for taking the initiative on a bipartisan basis to seek reform of military commissions. As you know, in his speech, as the chairman remarked, at the National Archives on May 21 President Obama called for the reform of military commissions and pledged to work with the Congress to amend the Military Commissions Act of 2006. So, speaking on behalf of the administration, we welcome the opportunity to be here today and to work with you on this important initiative.

Military commissions can and should contribute to our National security by becoming a viable forum for trying those who violate the laws of war. By working to improve military commissions, to make the process more fair and credible, we enhance our national security by providing the government with effective alternatives for bringing to justice those international terrorists who violate the laws of war.

Those are the remarks I wanted to make initially. Senator, I look forward to your questions.

[The prepared statement of Mr. Johnson follows:]

Chairman LEVIN. Thank you very much, Mr. Johnson.

Next is the assistant Attorney General for National Security Division at the Department of Justice, David Kris.

Mr. Kris.

**STATEMENT OF HON. DAVID S. KRIS, ASSISTANT ATTORNEY  
GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF  
JUSTICE**

Mr. KRIS. Thank you, Mr. Chairman, Senator McCain, and members of the committee. I come from the Justice Department and this is my first appearance before this committee. I thought I might begin just by briefly explaining how I think my work relates to that of the committee with respect to military commissions.

The National Security Division, which I lead, combines all of DOJ's major national security personnel and functions. Our basic mission is to protect national security consistent with the rule of

# **Attachment B**

# **Attachment C**



DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
OFFICE OF MILITARY COMMISSIONS

23 September 2009

MEMORANDUM FOR THE PROSECUTION

SUBJECT: *United States v. Mohammed Kamin*: Defense Request for Production of Witness to Testify at hearing on P-003

Ref: (a) R.M.C. 703(c)(2)(A)

1. Pursuant to reference (a), the defense respectfully requests production of the following person to personally appear and testify at the hearing, requested to be docketed for Wednesday, 7 October 2009, at Guantanamo Bay, Cuba:

Hon. Jeh Johnson, General Counsel, Department of Defense. Mr. Johnson's contact information can be obtained by and through [REDACTED]

Mr. Johnson is relevant to the Government Motion for an additional 60-day continuance and will testify regarding whether Mr. Kamin is being considered for prosecution before an Article III court, thus clarifying the contradiction between his affidavit and the government motion. Additionally, Mr. Johnson can testify regarding the DoD's position that material support is not a viable offense to be charged before a military commission because it is not a law of war offense, and whether he will permit military prosecutors to go forward on this offense if and when Congress ignores the Executive's efforts to strip this offense from the amended MCA.

2. In order to ensure a prompt and just resolution to this issue, and to allow the defense adequate time to seek relief from the Commission, as necessary, the defense requests a response to this request be provided **no later than 1630 EST, Friday, 25 September 2009**. Please advise if you have any questions or require additional information regarding this request. We may be reached at: (LCDR Federico) – [REDACTED]; (CPT West) – [REDACTED]

Respectfully Submitted,

By: Richard E.N. Federico

LCDR Richard E.N. Federico, JAGC, USN  
Detailed Defense Counsel for  
Mr. Mohammed Kamin

By: Clay M. West

CPT Clay M. West, JA, USAR  
Detailed Defense Counsel for  
Mr. Mohammed Kamin

# **Attachment D**



OFFICE OF THE  
CHIEF PROSECUTOR

**DEPARTMENT OF DEFENSE**  
**OFFICE OF MILITARY COMMISSIONS**  
**1600 DEFENSE PENTAGON**  
**WASHINGTON, DC 20301-1600**

September 25, 2009

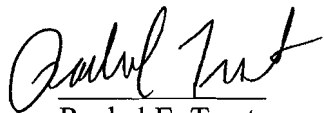
**MEMORANDUM FOR THE DEFENSE**

**SUBJECT:** United States v. Mohammed Kamin, Government Response to Defense Request for Production of Witness to Testify at Hearing on P-003.

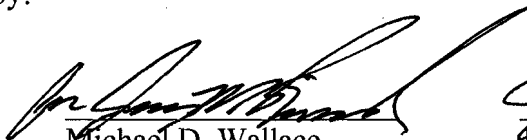
1. The Office of the Chief Prosecutor has considered your request for the Honorable Jeh Johnson to testify at a hearing on the Government's motion P-003. Your request is denied.
2. Pursuant to R.M.C. 703(b)(1) and (c)(2)(D), the testimony of Mr. Jeh Johnson is neither relevant nor necessary to the Government motion for a continuance or your renewed motion to abate the proceedings and dismiss the charge and specifications. Mr. Johnson's live testimony would not differ in any significant respect from his affidavit filed with P-003 nor would his opinion and recommendation change as to Providing Material Support for Terrorism. His testimony is not relevant to whether material support under the Military Commissions Act of 2006 remains valid. His testimony on this point would, like the defense argument, rely on speculation as to what Congress may or may not do, not on the law as it stands today. Besides, questions of law are the province of the judge and not subject to the opinion testimony of a witness. Whether Mr. Johnson believes Providing Material Support for Terrorism is a law of war offense is therefore irrelevant to the proceedings.
3. Mr. Johnson's testimony is also not relevant or necessary to clarify any alleged contradiction between his declaration and the Government's motion (P-003). There is no contradiction between the two because two separate reviews are being conducted of detainee cases. Although Mr. Kamin's case was not recommended for prosecution in an Article III court, the Attorney General, in consultation with the Secretary of Defense, has not reached a final decision respecting the ultimate disposition of the accused's case.
4. Lastly, Mr. Johnson is neither the Chief Prosecutor nor the Convening Authority. Thus, he would not be in the position to permit or prohibit the continued prosecution of Mr. Kamin. Consequently, his testimony as to "whether he will permit or prohibit military prosecutors to go forward on this offense if and when Congress ignores the Executive's efforts to strip this offense from the M.C.A." is irrelevant and unnecessary to the military judge's decision to grant or deny the Government's requested continuance.

5. If you have any questions, please contact the Trial Counsel, [REDACTED], by telephone at [REDACTED], or by unclassified email at [REDACTED].

Respectfully Submitted by:



Rachel E. Trest  
LT, JAGC, USN  
Trial Counsel



Michael D. Wallace  
MAJ, JA, USAR  
Assistant Trial Counsel



Jeremy K. McKissack  
Capt, JA, USAF  
Assistant Trial Counsel

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